

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Application of)	
)	
SINTRA CAPITAL CORPORATION)	
)	File No. 9507361
to Provide 39 GHz Point-to-Point Microwave)	
Service in Waco, Texas)	
)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 2000

Released: March 6, 2000

By the Commission:

I. INTRODUCTION

1. On April 1, 1999, Sintra Capital Corporation (Sintra) filed an application for review (AFR) of the Public Safety and Private Wireless Division's (Division) denial of its petition for reconsideration.¹ Sintra's AFR seeks reversal of the Division's decision to deny Sintra's petition for reconsideration and request for reinstatement of its application for authorization to operate point-to-point microwave service systems in the 38.6 to 40.0 GHz (39 GHz) band in the area of Waco, Texas. Based on the record in this proceeding, we find no basis to reverse the Division's decision. Accordingly, for the reasons set forth below, Sintra's AFR is denied.

II. BACKGROUND

2. On July 14, 1995, Sintra filed the above-captioned 39 GHz application,² but failed to account for a conflicting existing Station licensed to Biztel, Inc. (Biztel). Specifically, Sintra's proposed operations presented an overlap between Sintra's proposed service area and Biztel's authorized service area. On November 13, 1995, the Wireless Telecommunications Bureau (Bureau) announced that 39 GHz applications would no longer be accepted for filing in the Common Carrier or Operational Fixed Point-to-Point Microwave Radio Services until the Commission acted on a pending petition for rulemaking affecting these services.³ On December 15, 1995, the Commission modified the Bureau's 39 GHz *Freeze Order* by distinguishing between those pending 39 GHz applications that would be processed

¹ *Sintra Capital Corporation*, 14 FCC Rcd 3504 (1999) (*March 1 Order*).

² See FCC File No. 9507361.

³ Petition for Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, RM-8553, *Order*, 11 FCC Rcd 1156 (Acting Chief, WTB, 1995) (*Freeze Order*).

and those pending 39 GHz applications that would be held in abeyance pending the outcome of the rulemaking proceeding.⁴ In the *NPRM and Order*, the Commission held that it would not process applications or amendments received on or after November 13, 1995, but would hold them in abeyance pending the conclusion of the proceeding.⁵ Further, the Commission ordered that amendments to pending 39 GHz applications would not be accepted for filing until further notice.⁶ On March 27, 1996, Sintra filed an amendment (March 27th amendment) to its initial application reducing its proposed service area in an attempt to resolve the conflict with Biztel's licensed operations. On January 17, 1997, the Commission issued a Memorandum Opinion and Order (*Jan 17 MO&O*) responding to the petitions for reconsideration of the November and December freeze orders and a request for stay of the 39 GHz rule making proceeding.⁷ The Commission granted the reconsideration petitions in part and determined that it would process all 39 GHz amendments of right filed on or after November 13, 1995, but before December 15, 1995.⁸ The Commission found that amendments of right filed between November 13, 1995 and December 15, 1995, (*i.e.*, those amendments filed before the December 15 freeze suspended any further action on 39 GHz amendments) were effective upon filing, without further staff action.⁹

3. On August 20, 1997, the Licensing and Technical Analysis Branch (Branch) dismissed Sintra's application as unacceptable for filing, in accordance with former Section 101.35¹⁰ and Section 101.103¹¹ of the Commission's Rules. The Branch found that the service area requested by Sintra's initial application overlapped with the service area authorized for Biztel's Station WMT872.¹² On November 3, 1997, the Commission released a *Report and Order and Second NPRM*, announcing, *inter alia*, that it would dismiss, without prejudice, pending mutually exclusive applications, unless the mutual

⁴ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Notice of Proposed Rulemaking and Order*, 11 FCC Rcd 4930, 4988-4989 (1995) (*NPRM and Order*).

⁵ *Id.* at 4989 ¶ 124.

⁶ *Id.* at 4990 ¶ 125.

⁷ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket 95-183, *Memorandum Opinion and Order*, 12 FCC Rcd 2910 (1997).

⁸ *Id.* at 2918 ¶ 17.

⁹ *Id.*

¹⁰ 47 C.F.R. § 101.35(b) (1998) stated that applications are deemed defective and are returned to the applicant, *inter alia*, when the application fails to meet statutory requirements, special requirements applicable to the radio service involved, or any other Commission requirements. Formerly 47 C.F.R. § 101.35(b); now 47 C.F.R. § 1.926.

¹¹ 47 C.F.R. § 101.103 requires applicants to choose frequencies that will not cause interference to other licensed stations assigned exclusive use of frequencies over a service area.

¹² Letter from Michael J. Regiec, Acting Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Ms. Linda Scott, Sintra Capital Corporation (Aug. 20, 1997).

exclusivity was resolved by an amendment of right filed before December 15, 1995.¹³ On November 25, 1997, the Branch released a public notice describing its dismissal of the subject Sintra application.¹⁴

4. On December 29, 1997, Sintra filed a petition for reconsideration of the dismissal of its application arguing that the Branch had not considered Sintra's March 27th amendment which resolved the mutual exclusivity with Biztel.¹⁵ Sintra stated that the amendment of right should have been effective upon filing.¹⁶ Sintra further argued that the 39 GHz freeze on the acceptance of amendments of right violated the Administrative Procedures Act (APA) by impermissibly modifying or suspending this right without a notice and comment proceeding.¹⁷

5. On March 1, 1999, the Division denied Sintra's petition for reconsideration.¹⁸ The Division concluded that Sintra's application was defective and therefore properly dismissed due to its failure to coordinate with Biztel.¹⁹ Further, the Division found that the Branch was correct in not considering Sintra's March 27th amendment because it was filed well after the December 15, 1995, deadline for the acceptance of amendments established in the *NPRM and Order*.²⁰ On April 1, 1999, Sintra filed an AFR of the Division's *March 1 Order*. Subsequently, on July 29, 1999, the Commission addressed petitions for reconsideration of both the *Jan 17 MO&O* and the *Report and Order and Second NPRM*.²¹ In the *July 29 MO&O*, the Commission decided, *inter alia*, to affirm the decision to dismiss all amendments to resolve mutual exclusivity filed on or after December 15, 1995.²²

III. DISCUSSION

6. Sintra contends that the Division's *March 1 Order*, "ignores fundamental defects in the freeze policy, which were pointed out in its petition for reconsideration."²³ It argues that, pursuant to Section 553 of the APA, the Commission may not revoke a substantive right without a notice and

¹³ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET-Docket 95-183, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600 (1997) (*Report and Order and Second NPRM*).

¹⁴ *Public Notice*, Wireless Telecommunications Bureau Weekly Receipts and Disposals, No. 1964 (released Nov. 25, 1997).

¹⁵ Sintra Petition for Reconsideration (filed Dec. 29, 1997) at 4.

¹⁶ *Id.* at 3-5. Sintra argued that 47 C.F.R. § 101.29(a) (1998) (now 47 C.F.R. § 1.927) and 47 C.F.R. § 101.45(f)(2) provide that an amendment that cures a frequency conflict without creating a new one is an amendment of right.

¹⁷ *Id.* at 5.

¹⁸ *March 1 Order*, 14 FCC Rcd at 3504.

¹⁹ *Id.* at ¶ 4.

²⁰ *Id.* at ¶ 3.

²¹ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Memorandum Opinion and Order*, 14 FCC Rcd 12428 (1999) (*July 29 MO&O*).

²² *Id.* at 12430, 12445-12448.

²³ AFR at 7.

comment proceeding.²⁴ Sintra argues that, due to the freeze on acceptance of amendments of right following December 15, 1995, the Commission effectively revoked former Section 101.29²⁵ and Section 101.45²⁶ without a notice and comment proceeding. Although the Commission fully addressed these issues in the *July 29 MO&O*, we will nevertheless reiterate our findings as they apply to the above-captioned application. First, it is well settled that an application freeze is the type of procedural action that may be adopted without notice and comment.²⁷ Moreover, Sintra's argument does not distinguish between amendments that are accepted for filing and amendments that are not accepted for filing because of a freeze.²⁸ As the Commission has previously stated, simply because amendments of right are effective upon filing does not mean that once submitted such amendment must be accepted for filing.²⁹ In the *Jan 17 MO&O*, the Commission addressed this issue and concluded that the *NPRM and Order* suspended acceptance of all amendments of right filed after December 15, 1995.³⁰ Finally, we believe that because Sintra initially filed its application on July 14, 1995, it had sufficient time to discover and rectify its conflict with Biztel's station prior to the December 15, 1995 filing freeze.

7. Sintra next argues that the Commission's rationale for the freeze is inconsistent with its ban on amendments of right. Sintra contends that many 39 GHz applications, including its Waco application, contain mutual exclusivity issues that could be quickly addressed by allowing applicants to resolve minor frequency overlaps, "thereby saving the Bureau the extensive procedural effort of starting the allocation process from scratch."³¹ We disagree. This argument suggests that the Commission's sole rationale for the freeze was based on speed of application processing. This is not the case. In fact, the Commission has consistently stated that allowing 39 GHz applicants to amend their pending applications on or after the December 15, 1995 amendment cut-off date would be adverse to the goals of the 39 GHz

²⁴ AFR at 7-8. See 5 U.S.C. § 553.

²⁵ 47 C.F.R. § 101.29(a) (1998) (now 47 C.F.R. § 1.927) states that a "pending application may be amended as a matter of right if the application has not been designated for hearing, or for comparative evaluation pursuant to § 101.51, or for the random selection process, or is not subject to the competitive bidding process. . . ."

²⁶ 47 C.F.R. § 101.45(f)(2) explains that an amendment is considered minor if it "resolves frequency conflicts with authorized stations or other pending applications which would otherwise require resolution by hearing, by comparative evaluation pursuant to § 101.51, or by random selection pursuant to § 101.49 provided that the amendment does not create new or additional frequency conflicts."

²⁷ See *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637-38 (D.C. Cir. 1984) (holding Commission's filing freeze is a procedural rule not subject to the notice and comment requirements of the Administrative Procedures Act); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 952-53 (6th Cir. 1971) (same); *Kessler v. FCC*, 326 F.2d 673, 680-82 (D.C. Cir. 1963) (same).

²⁸ See *Kessler*, 326 F.2d at 684 (holding that 47 U.S.C. § 309(a), (e) which provides for a hearing on certain applications "filed with" the Commission, does not apply to applications submitted but not accepted for filing because of a freeze). See also *In the Matter of Application of Commco, LLC, Memorandum Opinion and Order*, FCC 99-347, ¶ 14 (1999) (Commission denied application for review filed by 39 GHz applicant seeking review of Licensing Division's dismissal of 39 GHz application and amendment, thereto).

²⁹ See *July 29 MO&O*, 14 FCC Rcd at 12435 ¶ 10.

³⁰ *Jan 17 MO&O*, 12 FCC Rcd at 2918 ¶ 17; *aff'd July 29 MO&O*, 14 FCC Rcd at 12445-47 ¶ 31-34.

³¹ AFR at 8.

rulemaking proceeding.³² The Commission has enumerated several reasons for the freeze and the newly implemented licensing procedure, including a need to better accommodate 39 GHz services which support existing and emerging technologies, and to provide for competitive bidding which will allow spectrum to be acquired by those who value it most highly.³³

8. Finally, Sintra argues that the Commission's refusal to process its amendment of right is inconsistent with Section 309(j)(6)(E)³⁴ and prevents applicants from utilizing "the one method available to them to cure their applications and avoid frequency conflicts."³⁵ The Commission addressed this issue in the *July 29 MO&O*. Therein, the Commission determined that, due to the transition from site based licensing to geographic based licensing, amendments submitted pursuant to the former rules will be dismissed, because "Section 309(j)(6)(E) does not require us to adhere to an outmoded licensing policy in order to avoid mutual exclusivity."³⁶ Rather the Commission is merely required to employ certain methods to avoid mutual exclusivity "within the framework of existing policies."³⁷ Following a notice and comment period, the Commission chose to adopt competitive bidding procedures for the 39 GHz service to better serve the public interest.³⁸ Therefore, because Sintra filed its amendment pursuant to an obsolete "regulatory regime," Section 309(j)(6)(E) does not compel the processing of its March 27th amendment. Moreover, in this instance, we agree with the conclusion reached by the Division in the *March 1 Order*. The Division explained that Section 309(j)(6)(E) of the Communications Act, as amended, pertains to applications that meet Commission filing requirements. Because Sintra's application was dismissed as defective,³⁹ the application did not meet with Commission filing requirements, and therefore, mutual exclusivity did not exist. Accordingly, the provisions of Section 309(j)(6)(E) are not applicable in this situation.⁴⁰

IV. CONCLUSION AND ORDERING CLAUSE

9. By this *Memorandum Opinion and Order*, for the aforementioned reasons, we affirm the Division's denial of Sintra's petition for reconsideration and deny Sintra's application for review filed on April 1, 1999. In doing so, we deny Sintra's request for reinstatement and grant of its application to provide 39 GHz service in the Waco, Texas service area.

³² See *July 29 MO&O*, 14 FCC Rcd at 12445-6 ¶ 31 citing *Jan 17 MO&O*, 12 FCC Rcd at 2917; *Report and Order and Second NPRM*, 12 FCC Rcd at 18642.

³³ See *Report and Order and Second NPRM*, 12 FCC Rcd at 18642-43 ¶ 90.

³⁴ 47 U.S.C. § 309(j)(6)(E) directs the Commission to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity in application and licensing proceedings.

³⁵ AFR at 9.

³⁶ *July 29 MO&O*, 14 FCC Rcd at 12448 ¶ 37 citing *DIRECTV v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *supra* ¶ 3.

⁴⁰ *March 1 Order*, 14 FCC Rcd at 3505-3506 ¶ 4.

10. IT IS ORDERED THAT, pursuant to Section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Sintra Capital Corporation on April 1, 1999, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary